83 - 2006

NO. _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

WARREN JACKSON,

Peititioner,

vs

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO
EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO

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42 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE APPELLATE COURT'S RETROACTIVE APPLICATION OF ILLINOIS V GATES, ET UX (JUNE 8, 1983), 51 U.S. LAW WEEK 4709 WAS PROPER UNDER THE GUIDELINES SET FORTH IN UNITED STATES V JOHNSON, 457 U.S. 537 (1982).

II. WHETHER THE APPELLATE COURT'S DECISION THAT THE MAGISTRATE HAD A SUBSTANTIAL BASIS FOR FINDING PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT WAS PROPER WHERE THE "TOTALITY OF THE CIRCUMSTANCES" SHOWED THAT THE INFORMANT TOLD POLICE THAT "AT THE THURMAN ADDRESS THERE WAS A WHITE VAN THAT THEY WERE LOADING AND UNLOADING NEW LOOKING HOT CAR PARTS INTO AND OUT OF THE GARAGE AND INTO AND OUT OF A WHITE VAN AND THE MALES THAT WERE DOING IT WERE BLACK."

III. WHETHER THE APPELLATE COURT'S RELIANCE ON UNITED STATES V ROSS, 457 U.S. 798 (1982) TO SUSTAIN THE WARRANTLESS AUTOMOBILE (TRUCK) SEARCH WAS PROPER WHERE THE VEHICLE WAS PARKED AND BLOCKED BY POLICE CARS FROM BOTH DIRECTIONS.

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WARREN JACKSON,

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vs

STATE OF OHIO,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY, OHIO

Petitioner, Warren Jackson, respectfully urges that a writ of certiorari issue to review the

judgment and opinion of the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, Ohio, rendered on October 20, 1983.

OPINION BELOW

The opinion of the Court of Appeals of Ohio, Eighth Appellate District is attached as part of the Appendix. (App. 2-10). The order of the Ohio Supreme Court refusing to review the instant case is attached at Appendix 11 .

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The order of the Supreme Court of Ohio refusing to review the instant case was rendered on March 21, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth and Fourteenth Amendments to the Constitution of the United States, which provide, in pertinent part, as follows:

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . .

FOURTEENTH AMENDMENT

. . . nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its durisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was charged by indictment with three counts of receiving stolen property and two counts of possessing criminal tools. The date of offense was March 16, 1982. The receiving counts involved automobile parts, to wit: a 1981 Buick front end, a 1982 Oldsmobile front end, and a bumper from an unknown automobile. The criminal tools were alleged to be petitioner's 1978 G.M.C. truck and his tool box and tools contained therein. On the date of arrest, also March 16, 1982, it was apparent that petitioner was under surveillance by one Detective Kostura of the Cleveland Police Department.

The reason that the detective was in the area was because of a tip

received from a "reliable" informant. The specific information received was "that at the Thurman address there was a white van that they were loading and unloading new looking hot car parts into and out of the garage and into and out of a white van and the males that were doing it were black." This tip from the informant is "paraphrased" by police in the affidavit for search warrant granted later that date. There is no indication in said warrant how current or "fresh" the informant's tip was, however.

More importantly, though, Detective Kostura admitted when questioned that the informant never gave data to support his belief that the parts he saw were actually stolen. The detective "assumed" the parts to

be stolen based on the informant telling him that they were moved in and out at various times. The detective even agreed that he would have arrested anybody carrying an automobile part near petitioner's garage at that time. This background was what Detective Kostura relied upon initially to arrest petitioner and call for back-up assistance. The arrest was based on the fact that Warren Jackson was loading a front end clip onto his truck.

There is no question that this arrest was without a warrant. There is also no question that a warrantless search of the truck occurred prior to the search warrant being issued for the truck and garage under surveillance. This search was made even though the

truck had been parked the whole time and the back-up police cars arrived to block any attempt to leave.

It was interesting to note that Detective Kostura originally denied that a warrantless search had taken place. His testimony was that besides the front clip he saw being loaded the only item he observed was a green hood that he could see by standing in the cab portion of the vehicle and looking in the bed of the truck. He could see nothing from the rear of the truck as the door was locked by the time he showed up. This green Oldsmobile hood is described in the affidavit for warrant. Yet, also described in said warrant were "tools used to disassemble automobiles" and "tires mounted on wheels." This information had to come prior to the

execution of the search warrant.

In this regard the evidence eventually showed that Detective Kostura used a flashlight through a one inch to one and a half inch opening under the locked rear door of the van to see the tires. He couldn't even slide the flashlight underneath the opening but was told with another's assistance that they were Oldsmobile rims. He also remembered that he opened the toolbox in the cab of the van on the way to process the van. Like all of the other items eventually confiscated, Kostura had no prior information about these tools. Also a search was conducted in this instance as well, since the box was not open.

It is not Detective Kostura that swore out the affidavit for search

warrant, however. It is Detective Leonard Sims. Sims relied on Kostura's information from the informant and Kostura's viewing of the front clip being loaded. The only part Sims saw was the green hood. He also testified that an investigation was required to determine that any of the confiscated parts were in fact stolen. Kostura had never told him that anything was taken from the garage while he surveyed the scene and that nothing was known of the garage contents at the time the warrant was served.

It is clear that something was lost in the translation of events from Kostura to Sims. The informant's tip became expanded to describe the loading and unloading "at all hours even during late night hours when

legitimate businesses are closed." This is not what the informant told Kostura. Yet, this is what Sims includes in his affidavit, as well as implying that the informant and not Kostura said that "these parts are from late model vehicles and are extremely clean. Included are complete front end clips, hoods, doors, and trunk lids, and new appearing tires mounted on new wheels." This is simply not a good faith effort by the police. This information was obtained from a warrantless search by police, not from a reliable tip from an informant.

There is a reason that Detective Sims probably chose to embellish these events. It is for the same reason that he was chosen to sign the affidavit for warrant. It is because Sims had

"personal knowledge" of petitioner as a dealer in stolen auto parts. No one had this "personal knowledge" at the time of the warrantless arrest and search, however.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE APPELLATE COURT'S RETROACTIVE APPLICATION OF ILLINOIS V GATES, ET UX (JUNE 8, 1983), 51 U.S. LAW WEEK 4709 WAS PROPER UNDER THE GUIDELINES SET FORTH IN UNITED STATES V JOHNSON, 457 U.S. 537 (1982).

In its opinion, Ohio's Eighth District Court of Appeals chose to determine probable cause for the search warrant based on the "totality of the circumstances" test enunciated in Illinois v Gates, et ux, supra. This Court, in its opinion in Gates concludes that:

> It is wiser to abandon the 'two-pronged test' established by our decisions in Aquilar and Spinelli. In its place we reaffirm the totality of

the circumstances analysis that traditionally has informed probable cause determination.

It is petitioner's contention that Gates announced a new and unanticipated principle of law, which ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one." Hanover Shoe, Inc. v United Shoe Machinery Corp., 392 U.S. 481, 498 (1968). This being the case, Gates falls into that narrow class of decisions whose nonretroactivity is effectively preordained because they unmistakably signal "a clear break with the past," Desist v United States, 394 U.S. at 248. Further evidence that a clear break does occur is the majorities' feeling in Gates that while a

conscientious assessment of the basis for crediting anonymous tips is required by the Fourth Amendment that a standard that leaves virtually no place for ananymous citizen informants is not.

An additional reason that requires Gates to be held with prospective application is because a retroactive reach comes dangerously close to being ex post facto law. This is true even though this Court has already decided that procedural changes in law applied retroactively are not ex post facto even when a detrimental effect is had on the defendant. Dorbert v Florida, 430 U.S. 525 (1977).

II. WHETHER THE APPELLATE COURT'S DECISION THAT THE MAGISTRATE HAD A SUBSTANTIAL BASIS FOR FINDING PROBABLE CAUSE FOR THE ISSUANCE

OF A SEARCH WARRANT WAS PROPER WHERE THE "TOTALITY OF THE CIRCUMSTANCES" SHOWED THAT THE INFORMANT TOLD POLICE THAT "AT THE THURMAN ADDRESS THERE WAS A WHITE VAN THAT THEY WERE LOADING AND UNLOADING NEW LOOKING HOT CAR PARTS INTO AND OUT OF THE GARAGE AND INTO AND OUT OF A WHITE VAN AND THE MALES THAT WERE DOING IT WERE BLACK."

The opinion of the Court of Appeals does not realistically face the bad faith effort put forward by the Cleveland police in this matter. If it had, it could not have concluded the informant had given reliable information concerning the operation of a "chop shop." They could not have concluded that the informant had observed front end clips, hoods,

doors, trunk lids and tires mounted on new wheels being carried by black men into the garage. These observations were not made by the informant and the record proves it. Judge Rehnquist writes in Gates that the record there contained:

> Little, if anything regarding the subjective good faith of the police officers that searched the Gates' property --which might well be an important consideration in determining whether to fashion a good faith exception to the exclusionary rule.

The problem in the instant case is just the opposite. If the detective had not embellished the affidavit the "totality of the circumstances" would show little more than exists in

Question II within. Mere suspicion, however, is insufficient to establish any fair probability that contraband or other instruments of crime would be present. Brinegar v United States, 338 U.S. 160, 175 (1948). This is especially true where the record reflects that there were many garages in the alley on Thurman for rent to different people for different purposes. Further, there was no showing how the unidentified informant concluded how automobile parts look "hot."

The "totality of the circumstances" in the case at bar does not establish probable cause for a warrant to issue. In Gates, the police at least corroborated some of the details of the anonymous letter received, which proved incriminating. There is no

such corroboration of detail in the case at bar, other than the petitioner was loading car parts from his own garage into his own truck. The vital "basis of knowledge" prong of Aquilar and Spinelli was not satisfied in determining probable cause. Aquilar -Spinelli should have been the test here, but it was not.

III. WHETHER THE APPELLATE COURT'S RELIANCE ON UNITED STATES V ROSS, 457 U.S. 798 (1982) TO SUSTAIN THE WARRANTLESS AUTOMOBILE (TRUCK) SEARCH WAS PROPER WHERE THE VEHICLE WAS PARKED AND BLOCKED BY POLICE CARS FROM BOTH DIRECTIONS.

Justice Marshall and Brennan, in their dissenting opinion in Ross point out:

According to the majority,

whenever police have probable cause to believe that contraband may be found within an automobile that they have stopped on the highway,[1/] they may search not only the automobile but also any container found inside it, without obtaining a warrant . . . . And although the Court purports

---

1/ The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe to contain contraband. I do not understand the Court to address the applicability of the automobile exception rule announced today to parked cars. Cf. Collidge v New Hampshire, 403 U.S. 443 (1971).

> to rely on the mobility of an automobile and the impracticability of obtaining a warrant, it never explains why these concerns permit the warrantless search of a container, which can easily be seized and immobilized while police are obtaining a warrant. United States v Ross, 456 U.S. at 827, 828.

If in fact the dissent in Ross is correct as to its application to highway vehicles only, there is a serious lack of exigency to justify the warrantless search of petitioner's parked vehicle. Moreover, this parked vehicle was in an alley and surrounded by police cars. In addition, as mentioned previously,

the probable cause relied upon for this warrantless search appeared to be nothing more than suspicion.

It was also true that the arresting officers had ample opportunity to procure a search warrant since petitioner's vehicle was immobilized.

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of

ferreting out crime. United States v Johnson, supra.

Unfortunately, this was not done in this case and the Ohio Court of Appeals has condoned such conduct by its decision. It is petitioner's opinion that the Ross case does not dictate such an outcome.

Respectfully submitted

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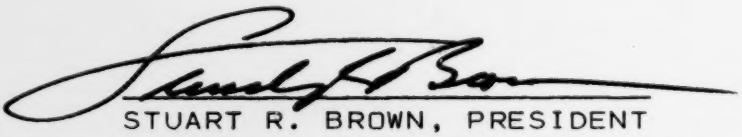
BY: _____
CHARLES B. LAZZARO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE FOREGOING WRIT OF CERTIORARI WAS MAILED TO THE OFFICE OF JOHN T. CORRIGAN, CUYAHOGA COUNTY PROSECUTOR, THE JUSTICE CENTER, 1200 ONTARIO, CLEVELAND, OHIO 44114, THIS 5th DAY OF JUNE, 1984.



STUART R. BROWN, PRESIDENT
BROWN BUSINESS GRAPHICS, INC.

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NOS. 46222
46223

STATE OF OHIO Plaintiff-Appellee	:	
vs	:	JOURNAL ENTRY and OPINION
WARREN JACKSON Defendant-Appellant	:	

DATE OF ANNOUNCEMENT
OF DECISION: OCTOBER 20, 1983

CHARACTER OF PROCEEDING: Criminal appeals from Court of Common Pleas Case Nos. CR-175563 (CA 46222) & CR-172537 (CA 46223).

DATE OF JOURNALIZATION:

APPEARANCES:

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PATTON, C.J.:

Defendant-appellant, Warren Jackson, was indicted on four counts of receiving stolen property and three counts of possession of criminal tools. Appellant entered pleas of not guilty to the above-stated offenses, and sought the suppression of evidence seized with regard to this action as being violative of his Fourth and Fourteenth Amendment Rights of the United States Constitution. A hearing was held with regard to appellant's motion to suppress, and on November 15, 1982, said motion was denied. Appellant subsequently entered a pleas of no contest and was found guilty on two counts of receiving stolen property and one count of possession of criminal tools. He was thereafter

sentenced accordingly.

It is appellant's present contention,[1] in this instant appeal, that the trial court erred in failing to grant his motion to suppress evidence claimed to have been seized in violation of his Constitutional rights. As contained in the record below, appellant was arrested by Officer Kostura of the Cleveland Police Department, after being observed loading an automobile's front end clip into his van. The officer had been conducting a surveillance at 2375 Thurman Avenue, Cleveland, Ohio based upon informant concerning the operation of a "chop shop". [2]

1/ "THE TRIAL JUDGE ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS

The informant had stated that she had observed black males placing various parts of automobiles in garages located in this area and that the parts were from late model automobiles including complete front end clips, hoods, doors, trunk lids, and tires mounted on new wheels.

Based on the foregoing, a stakeout of several weeks was made of the Thurman Avenue area. On March 16, 1982, Officer Kostura observed two black males loading a front end clip to a nearby van. In approaching the men, Officer Kostura asked for

EVIDENCE."

2/ "Chop shop" is a term known on the streets as an operation to rebuild or restore automobiles purchased with a valid salvage title, put together with stolen automobile parts.

identification and requested to look inside the van. Though this request was denied by the appellant, Officer Kostura stated that he could observe auto parts within the van. Appellant was arrested and a warrant issued for the search of the van and nearby garage.

It is appellant's present contention that the issuance of the search warrant was invalid because: (1) a description of auto parts contained within the van as provided by the warrant was the result of an illegal search of the van made prior to the issuance of the warrant;[3/] and (2) that the informant's tip failed to meet the requisite Aguilar-Spinelli two-prong test for probable cause upon which the contested warrant was

3/ Through a two-inch opening in the rear door.

issued. We disagree.

The warrant issued in this instant action was secured based upon the information provided by an informer who, on at least 10 prior occasions, had provided the police with reliable information; upon the observations of the arresting officers with regard to the appellant's loading of a front end clip into a van containing other auto parts, meeting the description of parts provided by the informant; and the affiant's personal knowledge of the appellant as a dealer in stolen auto parts. Under the "totality of the circumstances" test enunciated by the United States Supreme Court in Illinois v Gates, et ux. (June 8, 1983), 51 U.S. Law Week 4709, we find that the issuing magistrate had a

substantial basis for concluding that probable cause existed for the search of appellant's van and garage and therefore properly granted the requested warrant.

In so holding, we note in passing that under the recent holding of United States v Ross (June 1, 1982), 50 U.S. Law Week 4580, the "automobile exception" to the Fourth Amendment's warrant requirement applies to searches of vehicles that are supported by probable cause to believe that the vehicle contains contraband. Hence, "a search is not unreasonable if based on objective facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained."

Under the holding of Ross, any search of appellant's van fell within

the Fourth Amendment exception to the warrant requirement in that, as previously stated, there existed sufficient probable cause for the issuance of a search warrant. We there conclude that the trial court correctly denied appellant's motion for the suppression of evidence, and we accordingly affirm the trial court's judgment.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.
The Court finds there were reasonable grounds for this appeal.
It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

CORRIGAN, J.,

PRYATEL, J.,

CHIEF JUSTICE
JOHN T. PATTON

Received for filing

October 20, 1983
Gerald E. Fuerst, Clerk

THE SUPREME COURT OF OHIO

THE STATE OF OHIO	)	1984 TERM
	)	To Wit: Mar. 21, 1984
CITY OF COLUMBUS.	)	No. 84-73
STATE OF OHIO,	)	Appeal From The
	)	Court of Appeals
Appellee,	)	for Cuyahoga
	)	County
vs.	)	
	)	
WARREN G. JACKSON	)	

Appellant.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____, 19____.

No. 83-2006

In the Supreme Court of the United States

October Term, 1983

WARREN JACKSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTIONS OF LAW

I. A decision of the Supreme Court construing the Fourth Amendment is to be applied retroactively at least to all cases pending on direct review.

II. Under *Illinois v. Gates,* 103 S. Ct. 2317 (1983), there was a substantial basis for the magistrate to conclude that probable cause existed for the issuance of a search warrant.

III. Police plain view observations of automobile parts in petitioner's van did not constitute a search, therefore, no warrant was required. Even if their observations could be construed as a search, it was permissible under *U. S. v. Ross,* 456 U.S. 798 (1982).

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EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There are no substantial federal questions involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio.

The Court of Appeals, Eighth Judicial District, affirmed the convictions. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal as of right

for the reason that no substantial constitutional question exists in this case.

The Ohio courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is presented by the Petition for Certiorari.

HISTORY OF THE CASE

Petitioner, Warren Jackson, was indicted by a Cuyahoga County Grand Jury for three counts of Receiving Stolen Property and two counts of Possessing Criminal Tools. The receiving counts involved automobile parts, to-wit: a 1981 Buick front end, a 1982 Oldsmobile front end, and a bumper from an unknown automobile. The criminal tools were alleged to be petitioner's own 1978 GMC truck and his tool box including its contents.

Petitioner entered pleas of not guilty to the above-stated offenses, and sought to suppress the evidence seized in this action. The trial court denied petitioner's Motion to Suppress. Petitioner subsequently entered a plea of no contest and was found guilty on two counts of Receiving Stolen Property and one count of Possession of Criminal Tools. Thereafter, petitioner was sentenced.

On October 20, 1983, the Eighth District Court of Appeals affirmed the trial court's denial of petitioner's Motion to Suppress and the subsequent conviction. Petitioner filed a memorandum seeking jurisdiction in the Supreme Court of Ohio. The State Supreme Court denied jurisdiction on March 21, 1984. The present Petition for Writ of Certiorari to the Eighth District Court of Appeals followed.

STATEMENT OF THE FACTS

On March 16, 1982, Detective Kostura, employed by the City of Cleveland for approximately seventeen (17) years, was conducting a surveillance at 2375 Thurman Avenue, Cleveland, Ohio, based upon information provided by a reliable informant of the operation of a "chop shop" (R. 105).[1]

At approximately 12:45 p.m., Detective Kostura observed a white truck pull up occupied by a driver and a passenger (R. 102). Detective Kostura observed these two black men load a front-end clip from an automobile into the rear of the white truck (R. 108). Detective Kostura made an in-court identification of Douglas Walker and petitioner as the males seen on March 16, 1982 (R. 110). Detective Kostura called for assistance, then approached the truck (R. 112).

Detective Wendell, who was also working surveillance of this area, arrived. Detective Kostura asked the suspects for identification, and placed the suspects under arrest (R. 118).

Detective Kostura testified, looking from the front of the truck through the door there was a wooden panel type door that separated the front seat from the rear of the truck (R. 115). At this time, Detective Kostura observed a green hood of a newer type of Oldsmobile automobile (R. 116, 117) (Joint Exhibit 1).

Detective Kostura was staking out this particular location based on information received March 3, 1982 from a reliable informant. Information from this informant

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1. "Chop-shop" is a term known on the streets as an operation to rebuild or restore automobiles purchased with a valid salvage title put together with stolen automobile parts.

has led to the arrests and convictions of at least eight (8) to ten (10) individuals. Detective Kostura also looked in from the rear door of the white truck, which was up approximately one and one-half inches (1½"). Utilizing a flashlight, Detective Kostura observed aluminum wheels and a newer looking front-end clip (R. 231). Detective Kostura also learned from the owner of the building, George Martinek, that garage numbers five (5) and six (6) were leased to petitioner. Detective Kostura ran a routine check on petitioner and learned that he had been arrested on numerous occasions for auto theft related offenses.

Detective Sims was called in to assist in the investigation on March 16, 1982. Detective Sims has been employed by the Cleveland Police Department in Auto Theft Investigation in excess of ten (10) years (R. 144). Detective Sims also observed the green Oldsmobile hood in the white truck (R. 149).

Detective Sims provided information to Judge McAllister in attempting to secure a search warrant, specifically for 2375 Thurman Avenue, Cleveland, Ohio, garages five (5) and six (6), and a 1978 GMC white truck (R. 154) (State's Exhibits 3 & 4). Detective Sims testified to the execution of the warrant at 2375 Thurman Avenue, Cleveland, Ohio, and the inventory list of items confiscated (R. 164) (Defendant's Exhibit 3). Detective Sims noted the majority of items were: truck lids, doors, and front-end clips, objects he associated with the common practice of rebuilding automobiles with salvage titles and stolen parts (R. 168).

Detective Sims had investigated petitioner back in 1977 for auto theft.

Detectives Kostura and Sims successfully secured a search warrant from Judge McAllister based upon:

1. Reported information of the reliable informant;
2. Observations of activities on March 16, 1982 by both Detective Kostura and Detective Sims;
3. Prior convictions involving auto theft of Warren Jackson.

REASONS FOR DENYING THE WRIT

I. A DECISION OF THE SUPREME COURT CONSTRUING THE FOURTH AMENDMENT IS TO BE APPLIED RETROACTIVELY AT LEAST TO ALL CASES PENDING ON DIRECT REVIEW.

In *U. S. v. Johnson,* 457 U.S. 537 (1982), this Court held that a decision construing the Fourth Amendment is to be applied retroactively to all convictions not yet final at the time the Supreme Court decision is rendered, except where a case would be clearly controlled by existing retroactivity precedents. As a result, the rule in *Payton v. New York,* 445 U.S. 573 (1980), was held to be applicable to petitioner's conviction, which had been pending on direct appeal when *Payton* was decided. In the same way, the rule announced in *Illinois v. Gates,* 103 S. Ct. 2317 (1983) should apply to petitioner's conviction which was pending on direct appeal when *Gates* was handed down.

Petitioner contends, however, that the *Gates* rule should not apply to his case. He asserts that *Gates* "non-retroactivity" is preordained because it represents a rule of criminal procedure which is "a clear break with the past". *Desist v. U. S.*, 394 U.S. 248 (1969). This contention lacks merit under *U. S. v. Johnson,* 457 U.S. 537 (1982). For the *Gates* decision, as *Payton,* "did not announce an

entirely new and unanticipated principle of law". *Johnson, at* 215. Nor did *Gates* "expressly overrule a clear past precedent of this Court on which the litigants may have relied". *Id.* The *Gates* decision merely relaxed the standard for determining probable cause to issue a warrant based on an informant's tip. Under the former test in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. U. S.,* 393 U.S. 410 (1969), the magistrate was to consider only the informant's veracity, reliability, and basis of knowledge. Under *Gates,* the magistrate is to consider these same factors, but he is also to consider "all other circumstances set forth in the affidavit" before he makes a "practical and common sense decision". *Gates,* at 2332. Clearly, the *Gates* ruling has not caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule" as contemplated by petitioner. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481 (1968).

Therefore, there was no error in applying the *Gates* decision to petitioner's case. As in *Johnson,* to do so provides a principle of decision making consonant with this Court's original understanding in *Linkletter v. Walker,* 381 U.S. 618 (1965) and *Tehan v. U. S. ex rel. Shott,* 382 U.S. 406 (1966), that all newly declared constitutional rules of criminal procedure apply retrospectively at least to convictions not yet final when the rule was established.

II. UNDER ILLINOIS V. GATES, 103 S. CT. 2317 (1983), THERE WAS A SUBSTANTIAL BASIS FOR THE MAGISTRATE TO CONCLUDE THAT PROBABLE CAUSE EXISTED FOR THE ISSUANCE OF A SEARCH WARRANT.

Petitioner contends that there was an insufficient basis for Judge McAllister, and later Judge McManamon, to conclude that probable cause existed for the issuance of a

search warrant. A review of the record shows that petitioner's claim is unsupportable. Accordingly, his contention is meritless and does not warrant Supreme Court review.

In *Illinois v. Gates,* 103 S. Ct. 2317 (1983), this Court abandoned the rigid "two-pronged test" under *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. U. S.,* 393 U.S. 410 (1969), for determining whether an informant's tip establishes probable cause to issue a search warrant, and substituted the "totality of the circumstances" approach in its place. Now the task of the issuing magistrate is to look at all the "circumstances set forth in the affidavit before him" and make a "practical common sense decision whether there is a fair probability that contraband or evidence of a crime will be found in a particular place". *Gates,* at 2332. On appeal, the reviewing court should pay "great deference to the decision of the magistrate" and simply "ensure that he or she had a 'substantial basis for . . . concluding' that probable cause existed". *Gates,* at 2332 (quoting *Jones v. U. S.,* 362 U.S. 257, 271 (1960)).

The record in the instant case reveals an overwhelming factual basis upon which Judge McAllister could conclude that there was probable cause to issue the search warrant. First, a reliable informant stated he/she had observed black males taking extremely clean automobile parts from a white van and putting them into garages on Thurman Avenue. The parts were from late model vehicles, including complete front-end clips, hoods, doors, trunk lids and tires mounted on new wheels. This informant had previously supplied information which led to the convictions of eight to ten persons. Secondly, while conducting surveillance in the Thurman Avenue area on March 16, 1982, Detectives Kostura and Sims observed two black men load a front-end clip into the rear of a white truck. In

approaching the men, Detective Kostura asked for identification and requested to look inside the van. Although the request was denied, Detective Kostura looked in the partially opened up door of the van and saw aluminum wheels and a newer looking front-end clip. Detective Sims also saw a green Oldsmobile hood in the trunk. Thirdly, Detective Kostura learned from the building owner that the garages in question were leased to petitioner. A subsequent check revealed that petitioner had been arrested on numerous occasions for auto theft related offenses. In light of these facts, as they were presented to Judge McAllister, it is clear that there existed a substantial basis for concluding that stolen automobile parts were in the garages and the van. Accordingly, there was probable cause to issue a search warrant.

In addition, petitioner's contention that the police acted in bad faith is groundless. For the observations of the detectives were made in plain view. Further, no property was confiscated until after the warrant was issued.

III. POLICE PLAIN VIEW OBSERVATIONS OF AUTOMOBILE PARTS IN PETITIONER'S VAN DID NOT CONSTITUTE A SEARCH, THEREFORE, NO WARRANT WAS REQUIRED. EVEN IF THEIR OBSERVATIONS COULD BE CONSTRUED AS A SEARCH, IT WAS PERMISSIBLE UNDER U. S. V. ROSS, 456 U.S. 798 (1982).

Petitioner contends that a warrantless search of his van was conducted prior to the execution of the warrant. This contention, however, has no basis in the record. Accordingly, this claim is meritless and does not warrant Supreme Court review.

The record reveals that Detective Kostura and Detective Sims both observed a green hood from a newer model Oldsmobile in the rear of petitioner's van. Detective Kostura, with the aid of a flashlight, observed aluminum type wheels from the partially opened rear door of the truck. These observations were made in plain view, therefore, no search warrant was required. *Harris v. U. S.*, 390 U.S. 234 (1968). *See also, U. S. v. Lee,* 274 U.S. 559 (1927).

Even if there was a search, as the Eighth District Court of Appeals noted in passing, it was permissible under *U. S. v. Ross,* 456 U.S. 798 (1982). *Ross* held that the warrantless search of an automobile is not unreasonable if it is based on facts that would justify issuing a warrant. As discussed previously herein, there was an overwhelming factual basis to justify the issuance of the search warrant. Therefore, assuming *arguendo* that there was a search of petitioner's van, it fell within the Fourth Amendment exception to the warrant requirement as outlined in *Ross.*

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by this Court. The Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

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